No. 22,786

IN THE

United States Court of Appeals

For the Ninth Circuit

OPERATING ENGINEERS LOCAL UNION NO. 3, an unincorporated association, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, HAROLD L. BOWEN, JAMES F. CHURCH, P. H. McCARTHY, JR., et al.,

Appellants,

vs.

B. R. BURROUGHS,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLEE'S BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

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STATEMENT OF THE CASE

This is an appeal from a partial summary judgment which permanently enjoins appellant labor organizations from disciplining appellee for commencing two specified lawsuits without having first exhausted four months' internal union remedies. (R. 222:22-224:26.)[1]

[1]The Transcript of Record on Appeal will be referred to as "R". Numerical references preceding a colon are to the record page; numerical references following the colon are to lines on the indicated page. Appellants' Opening Brief is abbreviated herein as "A.O.B." Italics supplied throughout, except as otherwise indicated.

A. The Undisputed Facts

Appellee (sometimes referred to herein as "Mr. Burroughs") is now and for the past twenty-five years has been an active member of appellant Operating Engineers Local Union No. 3 (hereafter "Local 3"). (R. 218:23-25.)

Being opposed to certain election procedures followed by Local 3 and realizing that an election which would be governed by those procedures was scheduled for August 1966, Mr. Burroughs began in December 1965 to communicate his specific grounds of complaint to the officers of Local 3, sending copies of his letters to Local 3's parent, appellant International Union of Operating Engineers (hereafter sometimes referred to as "International"). (R. 189:7-13; R. 121-168.)

These communications made specific reference to the legal authority upon which appellee based his complaints, including citations to several decided cases involving other local unions of the International Union of Operating Engineers which held that the precise election procedures of which he was complaining were in conflict with federal statutes. (e.g., R. 136.)

In most instances, Mr. Burroughs' letters either went unanswered or were answered inconclusively. (R. 189:14-21, e.g., R. 134, 140, 141.)

Shortly before the scheduled election, and only when it became clear that the election procedures of Local 3 would not voluntarily be changed, appellee commenced a lawsuit, under Title I of the Labor Management Reporting and Disclosure Act of 1959,

73 Stat. 519-541 29 U.S.C.A. 401-531 (hereinafter the ("LMRDA") against his union in the Superior Court of the State of California for San Joaquin County (hereafter referred to as "the state court action"). This action was filed through and upon the advice of his attorney, and it sought to enjoin the holding of an election which Mr. Burroughs and his attorney were convinced was being conducted pursuant to procedures which had been held to be so illegal as to require the holding of a second election. (R. 189:22-190:7.)

The state court, however, decided that appellee's complaints were within the exclusive jurisdiction of the federal courts, and it accordingly refused to issue its injunction. (R. 72:7-73:19.) Rather than appeal the state court's refusal to act, largely because time was clearly of the essence, Mr. Burroughs' attorney advised him to file, and Mr. Burroughs did file (through his attorney), an action in the United States District Court in Sacramento (hereafter referred to as "the federal court action"). This action was not pressed, as the election which was sought to be enjoined was completed while it was pending. (R. 190: 11-15, 30-32; R. 191:6-7.)

Both of the aforesaid actions were filed through and upon the advice of his attorney, and each based claim for relief upon Title I of the LMRDA. (R. 56:24-28; R. 87:29-32.) Contrary to the assertion in appellants' opening brief (A.O.B. 4), each action contained the allegation that Mr. Burroughs had exhausted required internal union remedies. (R. 57: 28-30; 90:5-7.)

As a result of appellee's institution of the aforementioned lawsuits, two charges were made against and served upon him, one by appellant Bowen, a member of Local 3, in regard to his commencement of the state court action and the other by appellant Church, also a member of Local 3, in regard to his commencement of the federal court action. Both charges were identical, except for the identification of the lawsuit, and each specifically charged that:

> ". . . [appellee] commenced a civil action against Operating Engineers Local Union No. 3 in which he sought [certain specified relief] without in the four (4) months next preceding commencement of the civil action or at any time having exhausted all or any rights, remedies and reasonable provisions for hearing and appeal within the organization." (R. 10-13.)

Mr. Burroughs was found guilty of these charges at two separate union trials, one in Stockton relating to the state court action, and the second in Sacramento relating to the federal court action and, pursuant to Article XVII, Section 4 of the International Constitution,[2] he was fined a total amount of $7,158.33. (R. 3:23-31; R. 191:10-19.)

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[2]Article XVII, Section 4 of the International Constitution provides:

> "All Court Actions Superseded
>
> Art. XVII Section 4. No suit or other action at law or equity shall be brought in any court and no proceeding shall be initiated before any administrative agency by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. This pro-

Mr. Burroughs appealed this discipline to the International, which upheld and affirmed the decisions and penalties imposed by Local 3, but stayed the enforcement thereof on the condition that for three years Mr. Burroughs not directly or indirectly support or participate in any legal action violative of Article XVII, Section 4. (R. 20-21.)

Appellee then instituted this action, challenging the legality of the discipline imposed upon him. He sought and obtained summary judgment that the discipline was, as he contended, in violation of rights guaranteed him by the LMRDA.

B. The Issues

Appellants' arguments for reversing such judgment can be distilled to three main contentions, namely: (1) LMRDA Section 101(a)(4) should be interpreted to permit a union to discipline one of its members for suing it without first exhausting "reasonable" intra-union remedies for a period of four months; (2) The issue of appellee's good faith in filing the lawsuits which resulted in his discipline is one of material fact not to be decided on summary judgment; and (3) The relief granted by the district court was unnecessary, as it was the same as that granted by International.

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vision shall only require resort to internal remedies for a period not exceeding four (4) months. Any member violating this provision, shall, in addition to the penalties prescribed in the Constitution and Ritual, be subject to a fine equal to the full amount of the costs incurred in the defense of any such action by the Union, together with such costs additional as the court may fix or assess against said member."

The district court, in its conclusions of law herein, held said provision to be in violation of the LMRDA as applied to the facts of this case. (R. 221:18-20)

Specifically, the issues which this court is asked to decide are:

1. Whether a labor organization may discipline one of its members solely because it decides that he filed a lawsuit against it without first exhausting internal union remedies for a period of four months?

2. Whether, in view of the charges which formed the basis of appellee's discipline, his good faith is an issue in this litigation?

3. Whether the decision of the International Union conditionally suspending the enforcement of appellee's discipline rendered the permanent injunction of the district court unnecessary?

SUMMARY OF ARGUMENT

1. The LMRDA specifically precludes a union from punishing one of its members for commencing a lawsuit against it. The provision of that Act relating to internal union remedies has been consistently interpreted to mean that only a court, in its discretion, may require exhaustion of internal union remedies before granting judicial relief.

2. Only those grounds contained in the specific charges upon which a union member's discipline is based may be urged as justification for his discipline. Since appellee's good faith in instituting the lawsuits which resulted in his punishment was not an issue which was presented by the charges which form the

basis for his discipline, it is not a material issue in this litigation.

3. The permanent injunction issued by the district court is not rendered unnecessary by the International's conditional suspension of enforcement of the enjoined discipline.

ARGUMENT

1. THE DISCIPLINE WHICH WAS IMPOSED UPON THE APPELLEE IS PROHIBITED BY THE LMRDA.

Since appellee claims that discipline imposed upon him based solely on the charge that "he commenced a civil action against [Local 3] . . . without in the four months next preceding commencement of the civil action . . . having exhausted all or any rights, remedies and reasonable provisions for hearing and appeal within the organization," is illegal, even if such charge is true, the only issue material to appellee's claim for injunctive relief is whether he was disciplined by his union on such ground. Neither he nor appellants question the fact that he was so disciplined.

While it is true that the parties are in dispute as to whether appellee exhausted available intra-union remedies prior to institution of the lawsuit for which he was disciplined, the cases cited below make it clear that this fact is immaterial, and that as a matter of law, discipline of a union member by his union solely because he filed suit against it before exhausting

four months' intra-union remedies is a violation of the LMRDA.

Appellants admit that the discipline complained of was imposed because appellee commenced a lawsuit to enforce "his rights under Title I of the U.S. Labor Management Disclosure Act of 1959". (R. 29:17-19.) It is clear that the right to institute such a lawsuit is specifically guaranteed by the LMRDA. LMRDA §§102, 103 (29 U.S.C.A. §§412, 413).

Additionally, the Act specifically prohibits a union from disciplining a member for exercising a right guaranteed by the Act. Section 609 of the Act (29 U.S.C.A. §529) provides:

> "It shall be unlawful for any labor organization, or any officer, agency, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. * * * "

While it is true that a union member is subject to the requirement that he exhaust available internal union remedies for a period of four months prior to instituting suit against his union (LMRDA §101 (a) (4), 29 U.S.C.A. 411 (a) (4)), it has been consistently held that this exhaustion requirement is one of judicial administration and is to be implemented only through the court's exercise of discretion as to whether *it* will permit suit.

NLRB v. Industrial Union of Marine and Shipbuilding Workers, etc., ... U.S. ....., 20 L.Ed.2d

706, 68 LRRM 2257 (1968), is directly in point. In that case the Supreme Court held that a labor union may not discipline one of its members because he took legal action against it without first exhausting intra-union remedies.[3] In that case as in this, a union member was disciplined by his union on the ground that he took legal action against his union without first exhausting four months available internal union remedies. In that case as in this, the union imposed the discipline pursuant to constitutional provision. In that case as in this, the union found as a fact that the legal action was taken without exhausting internal union remedies. In that case as in this, the issue to be decided by the court was whether such discipline was lawful.

As appellants argue in the present case, the Marine & Shipbuilders Union argued that union discipline was proper so long as the intra-union remedies would impose no unreasonable delay or hardship upon the complainant. This argument was rejected, the Supreme Court stating:

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[3]The Supreme Court limited its holding to situations where, as in the present case, "the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act" (20 L.Ed2d, at 714). In the present case, Mr. Burroughs' complaints specifically alleged that Local No. 3's election procedures were in violation of the LMRDA, which extensively covers union elections. There is no question but that union elections are considered by Congress to be a part of the public domain. See LMRDA §§101(a)(1), 401-402, 29 U.S.C.A. §§411(a)(1), 481-482; See also *Wirtz v. Local 191, etc.*, 218 F.Supp. 855 (D.Conn. 1963), *aff'd.* 330 F.2d 999 ("Congress recognized that . . . the public interest in safeguarding and improving the [union] electoral process exceeds even that of the members . . .").

> The difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge . . . without exhausting internal union procedures, he would have no recourse against the discipline of the union. That risk alone is likely to chill the exercise of a member's right to a . . . remedy and induce him to forego his grievance or pursue a futile union procedure. (20 L.Ed.2d at 713)

Also as in the present case, the union argued that the proviso to LMRDA §101(a)(4) authorized such discipline. The Supreme Court also rejected this argument, concluding:

> We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency. (*Ibid.*)

The *Marine and Shipbuilding Workers* case, while the most recent and authoritative directive, is not the only precedent for affirming the judgment in this case. In *Ryan v. International Brotherhood of Electrical Workers,* 361 F.2d 942 (7th Cir. 1966), *cert. denied*, 385 U.S. 935, both the District Court and the Court of Appeals for the Seventh Circuit decided that a union member who was disciplined by his

union because he sued it without first exhausting four months available internal union remedies was entitled to summary judgment that the discipline was unlawful. The Court of Appeals explained it decision as follows:

> "The Union admits that courts may, when the rule of exhaustion of remedies is posed as a defense to a member's suit, exercise discretion whether to require that internal union remedies be exhausted. The Union claims, however, that it has the right to discipline a member . . . should a member bring a suit without having first exhausted reasonable union procedures for review. In other words, that the Union may expel a member for bringing suit if the Court's discretion is exercised in favor of the defense of exhaustion of remedies and the suit dismissed as premature.
>
> * * *
>
> "This claim of the Union, it seems to us, makes a member's bringing of a suit against a union or its officers too chancy a gamble for the member and effectively blocks access to the courts by placing the member in the dilemma of swallowing the grievance about which he wishes to sue (and against which the court might grant immediate and necessary relief), or suing upon the speculation that he will be safe from expulsion by the court's discretion being exercised in his favor.
>
> "Congress cannot have intended to burden the protection it gave union members, in their right to sue in the 'Bill of Rights' of the LMRDA, with the hazard that is clear in defendants' claim. The right of free access to our courts is too precious a right to be curbed by the risky predic-

> tion that the judge's discretion may, like a lucky roll of the dice, turn up in favor of the suitor."

See also *Detroy v. American Guild of Variety Artists,* 286 F.2d 75, 78 (2d Cir. 1961) ("We . . . construe the statute [101 (a) (4)] to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required *by that court or agency* to exhaust internal remedies of less than four months duration before invoking outside assistance." [Emphasis by the court]), and *Burris v. International Brotherhood of Teamsters,* 244 Fed.Supp. 277, 280 (W.D.N.C. 1963) ("It is for the *court* to determine, in the exercise of some discretion, whether or not the proviso [of 101 (a) (4)] is to be invoked" [Emphasis by the court]).

Neither is this the first case where a local of the International Union of Operating Engineers has attempted to justify discipline of one of its members for taking legal action against it without first exhausting internal remedies.

In *Roberts v. NLRB,* 350 F.2d 427, 430 (D.C. Cir. 1965), involving Operating Engineers Local 925, the court held that discipline of a member by his union for filing charges with the NLRB without first exhausting internal union remedies was an unfair labor practice, to wit, restraint and coercion of employees in the exercise of their rights under the National Labor Relations Act. The court also considered the exhaustion proviso of LMRDA Section 101 (a) (4), and concluded:

> "The proviso does authorize indeed it may require, the agency or court to which the member comes for relief to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted—in deference to the congressional desire that a solution be reached by means other than at the hands of public authorities. Approval of such restraint by agency or court is quite different, however, from freeing the Union itself to impose a fine for failure of a member to exhaust such procedures. As then Professor Cox put it, 'the rule is one of judicial administration.' Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 831 (1960). And see the remarks of then Senator Kennedy, 105 Cong. Rec. 16414 (daily ed. September 3, 1959), 2 Leg. Hist. LMRDA 1943."

See also, *Local 138, International Union of Operating Engineers and Charles S. Skura,* 148 N.L.R.B. 679.[4]

Appellants have obviously spent considerable time and effort in presenting to the Court their view as to the status of the exhaustion of remedies doctrine in the federal courts, and they set forth facts which they conclude establish that appellee did not, in either the state court action or the federal court action, bring himself within any of the recognized exceptions to the exhaustion requirement. (A.O.B. 25-30.)

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[4]The rule of the *Roberts* and *Skura* cases was rejected by the Court of Appeals in *Industrial Union of Marine and Shipbuilding Workers, etc. v. NLRB,* 379 F.2d 702 (3d Cir. 1967). As noted above, the Supreme Court reversed. *NLRB v. Industrial Union of Marine and Shipbuilding Workers, supra.*

This appeal, however, does not concern the question of whether Mr. Burroughs did or did not in fact exhaust all available intra-union remedies prior to filing the actions which resulted in his discipline. What this appeal is concerned with is the asserted right of his union to discipline him if he is found to have instituted such actions without having first exhausted such intra-union remedies.

Appellee agrees, arguendo, with appellants' conclusion that there is a requirement that a union member exhaust "reasonable" intra-union remedies prior to bringing suit against his union.[5] It is evident, however, that such a conclusion does not tell us what consequences flow from failure to meet such requirement. It is appellee's position that he has a right to have a court decide whether, under the specific facts of his case, further exhaustion of intra-union remedies would be required. It is his position that his union may not restrict this right by severely punishing him if a court happens to decide that further exhaustion is required.

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[5]The language of Section 101 (a) (4) itself, providing that a union member "*may* be required to exhaust" intra-union remedies for not to exceed four months, and many cases, indicate that the exhaustion "requirement" is not one which is absolute. See for example, *Simmons v. Avisco, Local 713, etc.,* 350 F.2d 1012 (4th Cir. 1965); *Detroy v. American Guild of Variety Artists,* 286 F. 2d 75 (2d Cir. 1961), *cert. den.,* 366 U.S. 929; *Carroll v. Associated Musicians, etc.,* 235 F.Supp. 161, 171 (S.D.N.Y. 1963).

2. APPELLEE'S GOOD FAITH, OR "CLEAN HANDS," IN INSTITUTING THE ACTIONS WHICH RESULTED IN HIS DISCIPLINE CANNOT NOW BE QUESTIONED.

Appellants ask this Court to limit the application of the foregoing authorities and principles to situations where the lawsuit by the disciplined member was one filed in good faith, or, put another way, that lack of good faith results in "unclean hands" which may prevent judicial relief.

Whether or not the foregoing authorities should be so limited is immaterial to the present case, as the issue of such lack of good faith was not presented in the charges and trial which form the basis of the union member's discipline.[6] In a case such as the present one, where no issue of good faith was in any manner presented by the charges served upon the appellee, and when the sole question decided at the union trial was whether or not the required internal union remedies were properly exhausted, appellee's lack of good faith cannot be used as a justification for his discipline.

Section 101 (a) (5) of the LMRDA (29 U.S.C.A. 411 (a) (5)) provides that:

> "No member of any labor organization may be . . . disciplined . . . by such labor organization unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

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[6]Appellee vigorously denies, however, that the actions which his attorney filed on his behalf were filed in bad faith—a serious violation by his attorney of the Rules of Professional Conduct. See Cal. Bus. and Prof. Code, Sec. foll.6076, Rule 13.

In *Allen v. International Alliance of Theatrical Stage Employees, etc.,* 338 F.2d 309 (5th Cir. 1964), it was specifically held that no discipline may be justified on grounds not contained in the "written specific charges" required by the Act, and that any discipline based on other grounds not specified in such charges must be vacated notwithstanding justification on such other grounds. See also *Magelssen v. Local Union No. 518, etc.,* 233 F.Supp. 459 (W.D. Mo. 1964).

In the present case, appellee's union found, as a fact, that the charge that "he commenced a civil action against Operating Engineers Local Union No. 3 . . . without in the four months next preceding commencement of the civil action or at any time having exhausted any rights, remedies and reasonable provisions for hearing and appeal within the organization," was true.

No other facts were found by or presented at the Local 3 trial, and it was this charge and this charge alone which formed the basis for Mr. Burroughs' discipline. (R. 191:10-19.)

No issue as to any of the grounds now urged by appellants to justify appellee's discipline was presented at his union trial. Irrespective of whether it would be proper for a union to discipline one of its members on the grounds now urged by appellants, the failure to specify such grounds in the "written specific charges" served upon plaintiff precluded the district court, as it does this court, from considering them.

Since appellants have presented such matters, however, appellee feels that they deserve a response.

a. Presenting the Exhaustion Issue in the State Court and Federal Court Actions.

It is urged by appellants that Mr. Burroughs did not attempt to present to the court, in either the state court or the federal court action, a situation where intra-union remedies could be ignored.

Although the present record indicates that appellee did in fact raise the exhaustion issue in both the state and federal actions (R. 57:28-30; R. 90:5-7), even had he not raised the issue, this would not even have been reason to dismiss his action, let alone authorize union discipline. It has been held that failure to exhaust is a defense, and facts showing failure to exhaust without excuse must be presented by the *Union. Fruit and Vegetable Packers, etc. v. Morley,* 378 F. 2d 738 (9th Cir. 1967).[7] See also *Forline v. Helpers Local No. 42,* 211 F.Supp. 315, 317-18 (E.D. Pa. 1962).

b. The Reason for Dismissal of the State Court Action.

Appellants point out that the judge in the state court action found that Mr. Burroughs filed his action before giving the International Union four months within which to act on his appeal, and notwithstand-

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[7]"[W]e recognize that the exhaustion of intra-union remedies doctrine cannot apply unless there is available from the union a remedy which is neither uncertain nor futile. Inherent in this proposition is the idea that to invoke the exhaustion principle, *the union must show* that there was a procedure available to the members calculated to redress the particular grievance complained of."

ing such judgment, plaintiff filed a second action, referred to by appellants as a "sham", in the United States District Court in Sacramento.

As the full memorandum opinion in the state court action reflects, that action was dismissed on the ground that the action should have been brought in federal court, as the state court had no jurisdiction of the subject matter of the action. (R. 72:7-73:19.) Instead of appealing the ruling of the state court, appellee, upon the advice of his attorney, went to the federal court in Sacramento, where proceedings were suspended when the election was completed. (R. 190: 11-15, 30-32; R. 191:6-7.)

c. Appellee's Grounds for Believing That Local 3's Election Procedures Were Unlawful.

As stated in *Farowitz v. Associated Musicians of Greater New York,* 330 F.2d 999, 1002 (2d Cir. 1964):

> "A member's responsibility to his union as an institution surely cannot include any obligation that he sit idly by while the union follows a course of conduct which he reasonably believes to be illegal because of what a court of law has stated."

In the present situation, appellee's objection to the election which he sued to enjoin was based not upon his or his attorneys' unsupported beliefs, but upon specific judicial holdings in cases declaring nominating and voting procedures identical with those of Local 3 unlawful and grounds for setting aside an election. See *Wirtz v. Local Unions No. 406, 406-A, 406-B and 406-C, International Union of Operating*

Engineers, 254 F.Supp. 962 (E.D. La. 1966), holding the five year continuing membership requirement contained in Article XII, Section (A) 1 (a) of Local 3 By-laws and the declaration of candidacy provisions contained in Article XII, Section (B) 1 (a) of Local 3 By-laws grounds for setting aside an election; and *Wirtz v. Local 30, International Union of Operating Engineers,* 242 F.Supp. 631 (S.D.N.Y. 1965), similarly condemning the declaration of candidacy provision.

To say in the face of such precedents that the lawsuits filed by appellee were in bad faith, with unclean hands and were "sham", is clearly an unjustified attack on both appellee and his attorneys.

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3. THE INJUNCTION WAS REQUIRED TO PREVENT FURTHER DISCIPLINE.

Appellants argue that the order of the district court which, they admit, "restrain [s] the International and Local from imposing any Discipline for Burroughs' past acts in violation of Article XVII, Section 4 of the International Constitution" (A.O.B. 15) grants relief no greater than that which had already been granted by the International when it upheld and affirmed the decision of Local 3, but stayed its enforcement upon the condition that, for three years, appellee not take or support, directly or indirectly, any legal action against his union without first exhausting intra-union remedies. (R. 20-21.)

Absent the injunction of the district court, appellee is subject to the "*immediate and automatic* enforcement" (R. 21) of that very fine of which he here complains if he files or even "supports directly or indirectly" (R. 21) a lawsuit against his union in the future and it is decided that there was a failure to exhaust four months' intra-union remedies.

To say that such an immediate and automatic fine would not be discipline for the institution of the two lawsuits which have heretofore been filed is the epitome of form over substance. If appellants truly believe that such is the case, and that the district court granted relief no different than that granted by the district court, their appeal from the relief granted by the district court is a curious act indeed.[8]

Furthermore, the Article and Section of the International Constitution upon which the "stay" of the enforcement of the fines is conditioned, is the precise provision which was held by the district court to be in conflict with the LMRDA. Appellee claims, and the court below has decided, that this provision is in conflict with rights guaranteed appellee by the LMRDA. For the International to stay appellee's discipline so long as he does not exercise his legal rights is itself discipline of the most coercive type. It is this discipline, as well as the fines, which the district court's order enjoins. Clearly, its injunction was not superfluous.

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[8]See *Consumers Union of United States v. Admiral Corporation*, 186 F.Supp. 800, 801 (S.D.N.Y. 1960): "If defendant has no intention of repeating [the acts enjoined], then no injury ensues to it from the granting of the injunction."

CONCLUSION

Reversal of the judgment of the district court would effectively curtail the precious right of free access to the courts guaranteed every union member by the LMRDA. It is respectfully submitted that the decision of the district court should be affirmed.

Dated, Sacramento, California,
September 3, 1968.

Respectfully submitted,
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By MERRILL J. SCHWARTZ,
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